Is the Cal Savers Plan Preempted by ERISA?

By Hon. Victor B. Kenton (Ret.)

Even before the pandemic struck in early 2020, approximately 10,000 Americans retired each day. By 2030, 20% of the U.S. population will be of retirement age. Since the pandemic began, workers have lost their jobs in record numbers. 55% of Americans now have insufficient savings to retire. Close to half of California workers are projected to retire with incomes below 200% of the poverty level. 62% of employees depend on Social Security for more than half of their income.

California created the California Secure Choice Retirement Program, now called Cal Savers. The program was implemented in July 2017. Cal Savers set up a program of individual IRA's allowing enrollment by eligible employees based on a formula primarily correlated to the number of employees in an organization. As of October 2020, approximately 4,324 employers had registered, and 90,000 workers had enrolled.

Employers' participation is limited to registering with the program; providing statistical employee information to an outside administrator; and remitting employees' contributions to the plan administrator. The administrator sends each eligible employee an information packet, which includes opt out information. Employees can opt out before enrollment, or at any time thereafter.

Cal Savers is available only to employees whose employers do not provide a tax qualified retirement savings program. The individual IRA's are funded entirely through employee contributions. Registration is mandatory for employers that do not provide employees with a tax qualified retirement program. The Act (*see* Cal. Gov't Code Section 100034(b)) provides that employers are not fiduciaries, and have no authority or control over the design, investment, administration, or operation of the program. If an employer does establish a qualified plan, it becomes exempt from participation in Cal Savers. (*See* Cal. Gov't Code Section 100000(d)(1)(3).)

Whether Cal Savers is preempted by ERISA is the central issue in a case now pending before the Ninth Circuit: *Howard Jarvis Taxpayers Assn. et. al., Plaintiffs-Appellants v. California Secure Choice Retirement Savings Program Defendants-Appellees,* Case No. 20-15591, on appeal from a District Court decision dismissing the case (443 F. Supp 3d. 1152 (E.D. Ca. 2020)).

Amicus briefs have been filed by the DOL in support of Plaintiffs' position, and by the program administrator and several public interest law firms and organizations supporting the underlying decision in favor of Cal Savers.

Under ERISA, a state law is preempted if it "relates to" an employee benefit plan (*see* 29 U.S.C. Section 1144(a)). In their brief, appellees argue that ERISA only preempts state laws that bear upon employee benefit plans, to the extent that such plans are established or maintained by an employer (*see* 29 U.S.C. Section 1003(a)). Further, appellees argue that while Cal Savers does impose some administrative responsibilities on employers, it does not trigger preemption because those administrative duties do not involve more than a modicum of discretion (citing *Golden Gate Restaurant Assn. vs, City & County of San Francisco*, 546 F3d. 639 (9th 2008).)

(Continued on the next page)

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(Continued from page 13)

Appellants assert that employers are required to make difficult, discretionary decisions as to management and participation, while appellees argue that employers under the program perform strictly ministerial duties.

In the underlying USDC opinion, the Court held that Cal Savers does not create an employee benefit plan under ERISA; that employers have no discretion in the administration of the program; and that the program does not contain an impermissible connection with ERISA because it does not interfere with existing ERISA or retirement plans provided by employers. The District Court declined to find that the 1975 Safe Harbor provisions enacted by the DOL apply (*See* 29 C.F.R. Section 2510.3-2(d)), because Cal Savers is not an ERISA program. Appellees' argument to the Circuit is that if the program is considered to be preempted by ERISA, the Safe Harbor provisions apply.

Under Safe Harbor, IRA's offered by employers do not constitute ERISA employee benefit plans if four factors apply: (1) the employer makes no contributions to the account; (2) employee participation is completely voluntary; (3) the employer does not endorse the program; and (4) any compensation received by the employer is limited to reasonable compensation for services actually rendered in connection with payroll deductions or dues checkoffs. (*Id.*)

The pending case has great significance for the future and viability of the Cal Savers program, and potentially other, similar programs operating in Oregon and Illinois, and four other states (Maryland, Connecticut, New jersey, and Colorado) which have enacted similar programs and are preparing to enact them. ERISA practitioners will be keeping a close watch on the progress of this case.

Victor Kenton was a United States Magistrate Judge in the Central District of California from 2001-2015. Since leaving the bench, he has worked as a mediator, arbitrator, discovery referee and special master through Judicate West.

17th Annual FBA-LA Bankruptcy Ethics Symposium

By Servando Martinez and Brenna Irving, William S. Boyd School of Law, Class of 2023

This past November, the Los Angeles Chapter of the Federal Bar Association hosted its 17th Annual Bankruptcy Ethics Symposium. The Symposium carried its usual informative and amusing spirit, but with the now-quotidian Covid influence. Though refreshments were not conducive to the online format, the speakers compensated with abundant entertainment. Audience members enjoyed a Dilbert comic, humorous commercials from Sprint and Postbank, a movie scene from "Repo Man," and more.

Nancy B. Rapoport, a distinguished professor at William S. Boyd School of Law and a bankruptcy fee examiner, enthusiastically kicked off the event by engaging the virtual audience with her keynote speech, "Telling the Story on Your Timesheets: A Fee Examiner's Tips for Creditors' Lawyers and Bankruptcy Estate Professionals." Professor Rapoport began with the fee examiner's essential role of helping courts determine reasonableness. This often means fee examiners are not merely looking at numbers, but analyzing attorney behavior through timesheets. The first large issue with attorney behavior is overstaffed meetings, where firms bill for meetings with unnecessary attorneys who do not contribute to the flow of work. A second major issue is improper apportionment of work, where senior associates bill their hourly rate for work that could be done by junior associates. Professor Rapoport also forewarns attorneys of common billing mistakes such as expensive meals, liquor, business class flights, and the like. These expenses, which she humorously labels "bad hygiene," trigger fee examiners to review timesheets more closely.

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